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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 275

SWEDISH AMERICAN LINES,
Petitioner,

—against—

JOSEPH J. FERRANTE, ANTONIO HRONCICH and VITO SALVEMINI,
Respondents,

—and against—

NACIREMA OPERATING CO., INC.,
Respondent-Impleaded.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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29 C. F. R. 9.1, 9.2, 9.3, 9.81, 9.82 (Renumbered as 29 C. F. R. 1504.1, 1504.2, 1504.3, 1504.81 and 1504.82 on February 21, 1963) 9, 1a-6a

MISCELLANEOUS:

Norris, Maritime Personal Injuries (1959), 1964 Supplement, p. 59 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 16, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals printed in Appendix B hereto, infra, p. 1b, is reported in 331 F. 2d 571. There was no District Court opinion. The District Court's findings of fact and conclusions of law, quoted in the Court of Appeals opinion, infra, pages 2b-5b and also set forth in Appendix Record, pages 86a-89a, were not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 16, 1964. The jurisdiction of this Court is invoked under 29 U. S. C. Section 1254(1).

QUESTION PRESENTED

Is a shipowner liable for breach of warranty of seaworthiness when longshoremen are injured by the contracting stevedores' negligent use of the ship's fit equipment?

STATUTES AND REGULATIONS INVOLVED

No statutes are involved. The regulations involved are Safety and Health Regulations for Longshoring effective March 21, 1960. Title 29, Code of Federal Regulations, Labor. Subtitle A-Office of the Secretary of Labor. Part 9-Safety and Health Regulations for Longshoring. They are printed in Appendix A, infra, pages 1a-6a.

STATEMENT

The libel was filed December 1, 1960 to recover damages for personal injuries sustained by respondents herein, Joseph J. Ferrante, Antonio Hroncich and Vito Salvemini *in personam* against Swedish American Lines, petitioner herein, and *in rem* against the steamship Maltesholm. The injuries occurred in an accident on October 28, 1960 when the Maltesholm, while discharging a shipment of newsprint paper in rolls at Jersey City, New Jersey, was also unloading a draft load of plywood "walking boards", each board measuring about 9 feet by 5 feet by ¾ inch in thickness. These boards had been used to separate the rolls of newsprint during the voyage.

Petitioner, Swedish American Lines, which also filed its claim as owner of the Maltesholm, in turn impleaded re-

spondent-impleaded, Nacirema Operating Co., Inc., the contracting stevedores and the employer of the respondents herein, on the grounds that if Swedish American Lines was liable, which it denied, then it was entitled to indemnity and expenses of defense on the grounds the accident was caused by the impleaded-respondent's breach of implied warranty of workmanlike service.

The only negligence involved was that of the longshoremen in making up the draft or load of the walking boards to be hoisted out of the hold. Instead of putting these boards in a single pile, one on top of the other, and wrapping the manila rope sling around the boards so they could be lifted in one compact bundle, the longshoremen placed two piles of the boards side by side and placed the manila rope around the two piles. Consequently, when the boards were lifted the two piles shuffled together like a deck of cards, some boards falling out and injuring respondents.

At the trial the respondents claimed the accident was caused by the petitioner's mate having supplied manila instead of wire rope slings. The slings were loops of rope used to bind the boards together and to hook on to the cargo runners, the wire ropes leading to the winches and used to hoist cargo. Both the libel and the impleading petition were dismissed, the District Court holding the mate had provided the proper slings and that respondents' contention that it was improper to provide a manila rope sling to hoist wooden boards could not be sustained. In this the Court relied on respondents' own expert witness. There was no proof adduced that the mate was present when the boards were raised or had any knowledge that the longshoremen expected to hoist the boards in two piles.

On appeal the respondents' appeal as against petitioner was docketed as number 14146 and petitioner Swedish American Lines' appeal against Nacirema, since the pe-

tition was also dismissed by the District Court, was docketed as number 14147. Both appeals were heard together and the Court of Appeals reversed the findings, vacated the decree of the District Court as to both appeals and remanded the matter to the District Court for a new trial.

The Court of Appeals held that the improperly made up draft of boards made the petitioner liable to respondents for breach of warranty of seaworthiness (page 14b) ignoring the rule in other Circuits that a single negligent act by longshoremen not employed by the shipowner does not create such a breach of the warranty of seaworthiness as to entitle a longshoreman to recover for personal injuries. Rather the other Circuits require proof that the particular appurtenance was represented as fit by the shipowner, that the longshoreman was entitled to rely on the warranty and that the appurtenance was defective when warranted. According to the other Circuits a shipowner does not warrant that each and every longshoreman will always use due care.

The jurisdiction of the trial court was under 28 USC-1333 since this accident occurred upon navigable waters.

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals for the Third Circuit, holding a ship liable without fault on grounds of unseaworthiness for the negligent use of seaworthy gear by a contracting stevedore, is directly contrary to the doctrine of seaworthiness recently adopted by the Courts of Appeals for the First, Second, Fourth and Ninth Circuits.

In *Arena* v. *Luckenbach Steamship Co., Inc.*, 279 F. 2d 186 (1960), cert. denied 364 US 895 (1960) the Court of Appeals for the First Circuit held the ship was not unseaworthy where plaintiff was injured when rolls of paper, which had been negligently stowed on a loading board by longshoremen, spilled off the board while being loaded by

ship's equipment, injuring plaintiff who was in the hold below.

In *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (1962), cert. denied 371 U. S. 870 (1962), the Court of Appeals for the Second Circuit held a ship was not rendered unseaworthy when the longshoremen, while loading the ship, negligently hoisted the cargo too high and thus caused the runners, the wire ropes used to hoist the cargo, to be raised to an angle of almost 180° between the ends of the booms. This maneuver meant that the draft or load of cargo was being suspended in an almost flat span and placed a very heavy strain, far greater than the weight of the cargo, on the ship's booms. One of the booms buckled and the plaintiff was injured. This doctrine was followed by the Second Circuit in *Spinelli* v. *Isthmian Steamship Co.*, 326 F. 2d 870 (1964), cert. denied May 18, 1964, where the stevedores' negligently overloaded the gear and increased the size of a draft of steel pipe from six to nine pipes in spite of being warned by the ship's officers that it was too heavy for the winch. On June 3, 1964 in *Massa* v. *C. A. Venezuelan Navigacion*, the Second Circuit sustained the shipowner when longshoremen negligently inserted spreaders on a double pallet of oil drums placing one spreader on the top pallet and the second spreader on the bottom pallet, thus causing the drums to fall off when the draft was lifted. For the Court's benefit a copy of this opinion is annexed hereto as Appendix C.

In *Blankenship* v. *Ellerman's Wilson Line New York, Inc.*, 265 F. 2d 455 (1959) the Fourth Circuit held a vessel was seaworthy when a carpenter, working on a scaffold, fell because the scaffold was dislodged by a draft of lumber being discharged by other carpenters. This follows the principles of the earlier decision of *Edwards* v. *Steinns*, 207 F. 2d 734 (1953), holding that there was no error in a charge that the defendant shipowner would not be liable

for unseaworthiness if the accident was caused by the manner in which the stevedores operated the ship's winch.

In *Billeci* v. *United States*, 298 F. 2d 703 (1962), the Court of Appeals for the Ninth Circuit held that a ship was not rendered unseaworthy when the ship's winch fell out of gear because the winch operator, an employee of an independent contracting stevedore, failed to insert a readily available locking pin in an otherwise seaworthy winch. Here the Court stated:

> "The shipowner's warranty of seaworthiness does not extend to a negligent use by longshoremen of seaworthy appliances".

Dissatisfaction with the presently conflicting definitions of seaworthiness was expressed by Circuit Judge Hastie in a dissenting opinion in *Thompson* v. *Calmar Steamship Corp.*, 331 F. 2d 657 at p. 663, 3 Cir. (1964), where he stated:

> "Under this decision 'unseaworthiness' becomes a liability-imposing word without rational meaning or conceptual scope.
>
> Heretofore, to me at least, unseaworthiness has signified some unfit, unsound or unsafe condition of a vessel or its gear or equipment. A vessel may be unseaworthy because of a structural defect, or because it is improperly manned or because its equipment is defective or inadequate in some way. But, as I understand the facts in this case, the vessel and its gear were not defective in any way. . . ."
>
> "I think the Supreme Court has never supported a finding of unseaworthiness which could not be rationalized as involving some structural or functional unfitness of vessel or gear for its intended use. If any decision of an inferior court goes as far as this one, we certainly are not obligated to follow it.

> Unable to find any satisfactory rationalization for this decision or to comprehend its scope, I fear that the bar and the maritime community will find that our ruling leaves confused and doubtful the question of the ship's liability in many situations, in which it heretofore has seemed clear that no liability existed. . . ."

Martin J. Norris in his book, *Maritime Personal Injuries,* 1964 Supplement at page 59, points out this is a question to be reviewed by this Court at its earliest opportunity. Cases concerning sound equipment made harmful by longshoremen are in conflict, the writer pointing out that in *Crumady* v. *The Joachim Hendrick Fisser,* 358 U. S. 423 (1959), a vessel was held unseaworthy through the stevedore's negligence in putting an abnormal strain on a topping lift while using a winch with an improper setting. However, later in *Mitchell* v. *Trawler Racer,* 362 U. S. 539 (1960) this Court limited a shipowner's responsibility to furnishing a vessel and appurtenances reasonably fit for their intended use.

Here respondents proceeded to trial primarily on the theory that the shipowner should have furnished wire slings, not rope slings, to remove the walking boards. This was contradicted by their own expert witness who testified that rope slings were proper. On appeal respondents changed their tactics to attack the law as to unseaworthiness.

Thus the Court of Appeals for the Third Circuit has held that a single careless act by longshoremen entitles injured longshoremen to sue the shipowner for breach of warranty of seaworthiness, even though the guilty longshoremen were not employed by the shipowner. The proper rationale is that for recovery an injured longshoreman must prove that the appurtenance was in fact warranted as fit, that the longshoreman was entitled to and did rely on the warranty and that the appurtenance was unfit when war-

ranted. Hence a shipowner does not and cannot warrant that each draft of cargo is properly made up by the contracting stevedore or that the stevedore's employees will operate the winches properly and safely all day. Instead petitioner's authorities limit the warranty to a reasonable fitness for intended purpose at the time warranted. To require further responsibility of foreign shipowners for the individual acts of American longshoremen is contrary not only to petitioner's cited authorities, but also to the principles of proper industrial responsibility. The stevedoring industry should bear its own risks.

Now it is the law of the Third Circuit that a negligent act by the stevedore can impose liability upon a shipowner and make a ship liable by the improper use of fit equipment, even though the shipowner has no knowledge of the improper use nor opportunity to correct it. In the First, Second, Fourth and Ninth Circuits and according to this Court in *Mitchell* v. *Trawler Racer,* (supra), a shipowner's only obligation is to furnish a ship and equipment reasonably fit for their intended use.

2. The portion of the opinion dealing with the mate's obligation to stop the work if he observed a dangerous condition is not supported by the record.

The record is barren of any testimony that the ship's mate observed or suspected that the stevedores were going to lift two piles side by side. He merely furnished the slings, told the hatch boss not to make too heavy a draft and was told that the hatch boss knew what he was doing.

As the Second Circuit has held in *Spinelli* v. *Isthmian Steamship Co., surpra,* a ship's officer is not required to stop the work on making a suggestion as to the size of its drafts. There the stevedores were warned that a 9 pipe draft would be too heavy and made it up just the same. Rather it is the

sole obligation of the stevedore to conduct the details of their work, such as making up drafts, properly and insofar as the Third Circuit in this case may seek to require a higher standard of the mate it is contrary to the Second Circuit.

The Department of Labor Safety and Health Regulations for Longshoring put the responsibility of compliance with regulations as to drafts squarely upon the stevedore, the employers, 29 C. F. R. § 9.2(a), Appendix A, p. 3a. (The Section numbers are those in effect on October 28, 1960, the date of the accident. On February 21, 1963, the pertinent sections were renumbered 29 C. F. R. 1504.1, 1504.2, 1504.3, 1504.81 and 1504.82 without other change; 28 FR 1634). The regulations were not meant to place added responsibility upon shipowners or masters, 29 C. F. R. § 9.2(b), Appendix A, pages 3a-4a. Dealing specifically with drafts of lumber the regulations require that they shall be slung in such a manner as to prevent sliders, 29 C. F. R. § 9.81(c), Appendix A, page 5a. Furthermore, in building drafts it is required that drafts shall be so built and such means shall be taken as to prevent cargo from falling from the draft, 29 C. F. R. § 9.82(a), Appendix A, page 6a.

The accident complained of was caused by the violation of these regulations.

There is no case cited prior to the effective date of these regulations, March 21, 1960, requiring a ship's officer to maintain detailed supervision over the acts of a contracting stevedore. The Department of Labor regulations clarify the responsibility as of that date. Consequently, the primary duty to make up a safe draft is upon the stevedores, not upon the ship's officers.

The public policy for such an arrangement is obvious. There must be one party with responsibility. To require a foreign mate to undertake detailed supervision over long-

shoremen in view of the obvious language difficulties would be to make proper supervision practically impossible. Any foreign officer equipped with mariners' basic English would have great difficulty in directing the details of a stevedoring operation. Even the United States Coast Guard does not require American Merchant Marine officers to be fluent in the varous languages and dialects spoken by the longshoremen at their ports of call. Furthermore, administrative discipline is possible only against the stevedores who are permanently located in the jurisdiction.

As a practical matter, upon a retrial of this case, the question of liability will be determined on the grounds of unseaworthiness. Not only should the American Maritime Law be clarified on this question but the parties are reasonably entitled to know whether they can rely on the record heretofore adduced that the accident was caused through the improper building of the draft by the longshoremen or whether they are also required to pursue a tenuous line of proof attempting to show (1) knowledge of the improper makeup of the draft by Swedish American Lines and (2) power to stop the operation after receipt of such knowledge in time to avoid the accident.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated, New York, N. Y. July 14, 1964.

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LENNARD K. RAMBUSCH,
Of Counsel.

APPENDIX A

Regulations Involved

Safety and Health Regulations for Longshoring effective March 21, 1960.

Title 29, Code of Federal Regulations, Labor.

Subtitle A—Office of the Secretary of Labor.

Part 9—Safety and Health Regulations for Longshoring.

Foreword

(To Department of Labor Pamphlet, June, 1960)

This pamphlet contains safety and health regulations that have been determined by the Secretary of Labor to be reasonably necessary to protect the life, health and safety of employees engaged in longshoring, ship repairing, and related employments covered by section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended. These regulations have been issued pursuant to Public Law 85-742, 72 Stat. 835 (amending 44 Stat. 1444; 33 U. S. C. 941), and R. S. 161, 5 U. S. C. 22.

The regulations contained in this pamphlet have been published in the *Federal Register* and became effective on March 21, 1960. For the convenience of all concerned, this pamphlet contains the text of Public Law 85-742, the regulations concerning the granting of variations and the regulations concerning the reporting of injury statistics.

General authority for the administration of these regulations is vested in the Bureau of Labor Standards. Administrative responsibilities are imposed upon the Division of Safety. Functions are carried out through Area, District and Port Offices of the Bureau under the super-

vision of an Area Supervisor. A current list of such field offices is included in this pamphlet.

These regulations are mandatory with respect to employers subject to the Act, and affected persons should familiarize themselves with the contents of this publication. In this connection, Bureau personnel concerned with the administration of these regulations will extend all possible assistance.

Another function of the Bureau is to provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe work conditions and practices in employments covered by Section 41 of the Act, and to consult with and advise employers, employer organizations, employees, and employee organizations as to the best means of preventing injuries. It is sincerely hoped that management and labor will take cognizance of their responsibilities in this area and fully utilize the services provided by the Bureau. By so doing, it is hoped that the Bureau will be able to assist all concerned in reaching the goal of an accident-free industry.

These regulations were prepared under the direction of the Chief of the Division of Safety, Robert D. Gidel, by Ralph W. Netterstrom, Chief, Office of Maritime Safety Services, and Edward C. March, Assistant Chief, Office of Maritime Safety Services.

ARTHUR W. MOTLEY, *Director*
Bureau of Labor Standards

SUBPART A—GENERAL PROVISIONS

§ 9.1 PURPOSE AND AUTHORITY

(a) The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U. S. C. 901 et seq.) provides compensation for injuries suffered by employees when they are working for private employers within the Federal maritime jurisdiction on the navigable waters of the United States, including dry docks. Public Law 85-742, 72 Stat. 835, approved August 23, 1958, which amends section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended (44 Stat. 1444; 33 U. S. C. 941) requires, among other things, that every employer of the aforementioned employees "shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees." It is the purpose of the regulations of this part to carry out the intent of Public Law 85-742.

§ 9.2 SCOPE AND RESPONSIBILITY

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are

acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

§ 9.3

DEFINITIONS

(a) The term "shall" indicates provisions which are mandatory.

(b) The term "Secretary" means the Secretary of Labor.

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States.

(d) The term "employee" means any longshoreman, or other person engaged in longshoring operations or related employments, within the Federal maritime jurisdiction on the navigable waters of the United States, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

(e) The term "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

* * *

(i) The term "longshoring operations" means the loading, unloading, moving, or handling of cargo, ship's stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

(j) The term "related employments" means any employments performed as an incident to or in conjunction with longshoring operations including, but not restricted to, securing cargo, rigging, and employment as a porter, checker, or watchman.

* * *

Subpart H—Handling Cargo[4]

§ 9.81

SLINGING

(a) Drafts shall be safely slung before being hoisted. Loose dunnage or debris hanging or protruding from loads shall be removed.

(b) Cargo handling bridles, such as pallet bridles, which are to remain attached to the ship's gear while hoisting successive drafts, shall be attached by shackles, or other positive means shall be taken to prevent them from becoming accidentally disengaged from the cargo hook.

(c) Drafts of lumber, pipe, dunnage and other pieces, the top layer of which is not bound by the sling, shall be slung in such a manner as to prevent sliders. Double slings shall be used on unstrapped dunnage, except when, due to the size of hatch or deep tank openings, it is impractical to use them.

(d) Case hooks shall not be used for handling cases into or out of the vessel, unless the cases are specifically designed to be handled by this means.

(e) Bales of cotton, wool, cork, wood pulp, gunny bags or other similar articles shall not be hoisted into or out of

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[4] 46 CFR Parts 146-147 contains regulations of the U. S. Coast Guard pertaining to the handling of explosives and other dangerous cargo.

the vessel by their straps unless the straps are of sufficient strength to support the weight of the bale, and two hooks, each in a separate strap, are used.

(f) Loads requiring continuous manual guidance while in motion shall be provided with tag lines.

§ 9.82

BUILDING DRAFTS

(a) Drafts shall be so built or such means shall be taken as to prevent cargo from falling from the draft.

(b) Hand loaded buckets or tubs used in handling bulk cargo shall not be loaded above their rims.

(The Section numbers are those in effect on October 28, 1960, the date of the accident. On February 21, 1963, the pertinent sections were renumbered 29 C. F. R. 1504.1, 1504.2, 1504.3, 1504.81 and 1504.82 without other change; 28 FR 1634).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,146

JOSEPH J. FERRANTE, ANTONIO HRONCICH and VITO SALVEMINI,

Appellants

v.

SWEDISH AMERICAN LINES and the Steamship "MALTESHOLM", her engines, tackle, apparel, etc.,

v.

NACIREMA OPERATING CO., INC.

No. 14,147

JOSEPH J. FERRANTE, ANTONIO HRONCICH and VITO SALVEMINI

v.

SWEDISH AMERICAN LINES,

Appellant

and the Steamship "MALTESHOLM", her engines, tackle, apparel, etc.

v.

NACIREMA OPERATING CO., INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 8, 1963

Before KALODNER, STALEY and SMITH, *Circuit Judges*

Opinion of the Court

(Filed April 16, 1964)

By KALODNER, *Circuit Judge.*

The District Judge found that the negligence of a stevedore in using a faulty method in discharging a ship's cargo did not make the ship unseaworthy or negligent and this appeal and cross-appeal followed.[1]

The issues presented are whether the District Court used proper legal standards in arriving at its findings that the ship was neither negligent nor unseaworthy. The libelants contend that the District Court's fact-findings were "clearly erroneous" because they were the end result of the failure to apply proper legal standards.

Since the District Court's Findings of Fact and Conclusions of Law are essential to our disposition they will be stated as follows:

FINDINGS OF FACT

"1. Libelants, Joseph J. Ferrante, Antonio Hroncich and Vito Salvemini, were on October 28, 1960, and now are residents of the State of New Jersey, and were injured while working as longshoremen employed by Nacirema Operating Co., Inc. in the #2 hold of the M/S Maltesholm on October 28, 1960.

"2. Claimant-respondent, Swedish American Lines, was and now is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Sweden and was, on October 28, 1960, and still is, the owner of the M/S Maltesholm.

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[1]The District Court dismissed the libel on motion at the conclusion of the libellants' testimony on the score of the ship's unseaworthiness and negligence.

"3. Respondent-Impleaded, Nacirema Operating Co., Inc., was, on October 28, 1960, and now is, a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States and was on October 28, 1960, and still is, doing business in the State of New Jersey as a stevedore.

"4. The M/S Maltesholm was on October 28, 1960, and now is, a merchant vessel of Swedish registry, her home port being Gothenburg, Sweden. The ship had six hatches, #2, the site of the accident, being in the forward part of the ship.

"5. Libelant Ferrante asked the stevedore hatch boss for slings to be used in unloading some plywood boards. In turn the hatch boss asked the third mate of the ship for 'slings.'

"6. The third mate of the M/S Maltesholm procured and gave to the stevedore hatch boss two manila rope slings which the hatch boss then sent down to the employees of Nacirema, who proceeded to make up a sling load of plywood boards by assembling two piles of the boards side by side, these piles resting on 4 x 4 timbers so that each sling could be passed beneath the boards. Each sling was passed around the piles, one at each end, looped through itself and attached to a single hook. The hook was attached to wire rope runners which would lift the sling load from the hold.

"7. The making up of this sling load was done entirely by and under the direction of employees of Respondent-Impleaded.

"8. The only suggestion made by the third mate to the hatch boss was not to make big sling loads "because something might be could happen and broken," to which the hatch boss replied "I am the foreman and I know what I am doing." No attempt was made by the third mate to direct the method of unloading

nor did he interfere in any way with the conduct of the stevedoring.

"9. When the sling load of boards was lifted out of the hatch, the load came apart and some of the boards fell, striking Libelants and injuring them.

"10. Libelants' expert witness (with extensive experience as a longshoreman, as a supervisor of loading and unloading ships and as a ship foreman) testified that it was not standard procedure to make two piles of plywood boards, placed side by side to be lifted by slings, single piles only being used to make a sling load. He further testified that if this standard practice were not followed, it would be an element that would cause the load to fall. He also testified, that the use of either rope or wire is standard practice for lifting plywood, and that there was a preference for the use of rope on plywood.

"11. The accident was caused by the manner in which the sling load was made up by employees of Respondent-Impleaded with two piles, side by side.

"12. The duties of the third mate did not include supervision and control of the manner in which the longshoremen were doing their work. Rather, his duties consisted in pointing out the cargo to be discharged at Jersey City and also to observe the longshoremen so as to prevent damage to or theft of cargo, damage to the ship or smoking by the longshoremen.

"13. At the close of Libelant's case as to liability, Libelants having reserved their rights to introduce further medical testimony, Claimant-Respondent reserving its rights to proceed further if its motion be denied, moved to dismiss the libel and Respondent-Impleaded, with a similar reservation of rights if its motion be denied, moved to dismiss the petition.

"CONCLUSIONS OF LAW

"1. This Court has jurisdiction under Article III, Sec. 2 of the Constitution and under Title 28 U. S. C. Sec. 1333.

"2. The M/S Maltesholm was seaworthy at the time of the accident causing Libelelant' injuries because the ship's equipment, with which Libelants were working, was reasonably fit for its intended use. *Mahnich* v. *Southern S.S. Co.* 321 U. S. 96 (1944); *Mitchell* v. *Trawler Racer, Inc.* 362 U. S. 539 (1960).

"3. In the absence of interference or assumption of authority by a ship's officers or crew, the responsibility for making up slingloads is on the stevedore, not the shipowner, 29 C. F. R. Secs. 9.2, 9.3, 9.81 and 9.82.

"4. The accident of October 28, 1960 was caused solely by the negligence of the stevedores, which negligence did not create an unseaworthy condition.

"5. Absent the exercise of control over the stevedoring operation, a shipowner is not responsible for the negligent manner in which stevedores conduct their work, nor for the negligent use by longshoremen of seaworthy appliances. *Billeci* v. *United States*, 298 F. 2d 703 (9th Cir. 1962); *Paddu* v. *Royal Netherlands S.S. Co.*, F. 2d , 2d Cir. February 20, 1962, affirmed in banc F. 2d May 15, 1962.

"6. Absent liability upon the shipowner for an unseaworthy condition caused solely by the active negligence of the stevedoring company, there is no issue of indemnification of the shipowner by the stevedore company.

"7. The libel should be dismissed."

It is evident from the foregoing that the District Court regarded as solely dispositive of the issue of the ship's negligence its fact-finding that the ship did not exercise control over the stevedore's negligent method in loading the slings.

It is evident, too, that the District Court regarded as solely dispositive of the unseaworthiness issue the undisputed fact that the ship's equipment, viz., the manila ropes, "was reasonably fit for its intended use."

The facts as found by the District Court[2] may be summarized as follows:

At the time of the accident the stevedore's longshoremen were engaged in discharging 9′ x 5′ x ¾″ plywood boards from No. 2 hold of the M/S Maltesholm; the longshoremen used manila ropes supplied by the ship to form a sling in which two piles or stacks of board were placed; while a sling load was being lifted out of the hatch it came apart and some of the boards fell injuring the libelants; the placing of two piles of boards in a sling was not standard procedure; the loading of the slings "was done entirely by and under the direction" of the stevedore;[3] "the accident was caused by the manner in which the sling load was made up";[4] the third mate of the ship, one Szewczyk, told the stevedore's foreman "not to make big sling loads 'because something might be could be happen and broken' ", but "no attempt was made by the third mate to direct the method of unloading nor did he interfere in any way with the conduct of the stevedoring."[5]

On the fact-findings stated the District Court held, in sum, in its Conclusions of Law, that the ship was sea-

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[2]Detailed in the District Court's Findings of Fact and Conclusions of Law.

[3]Finding of Fact No. 7.

[4]Finding of Fact No. 11.

[5]Finding of Fact No. 8.

worthy "because the ship's equipment [manila ropes] . . . was reasonably fit for its intended use"; the loading method used by the stevedore was negligent but its negligence "did not create an unseaworthy condition"; the ship was not negligent because it did not exercise control over the stevedoring operation; that no issue of indemnification of the shipower by the stevedore existed "absent liability upon the shipowner for an unseaworthy condition caused solely by the active negligence of the stevedoring company".

First, as to the issue respecting negligence:

Applicable to the issue of the ship's negligence are these well-settled principles:

> "The work of loading and unloading is historically 'the work of the ship's service' ".[6]

Where a ship knows, or should have known, that the stevedore's method of discharging its cargo does not conform to the standard of reasonable care, and thereby creates a hazardous condition, the ship is negligent when it does not forbid the use of the method.[7]

Ordinarily, a ship owes a longshoreman the obligation to provide him with a safe place to work, and its failure to do so constitutes negligence.[8]

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[6] *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423,427 (1959).

[7] *Knox* v. *United States Lines Company*, 294 F. 2d 354 (3 Cir. 1961); *Beard* v. *Ellerman Lines, Ltd.*, 289 F. 2d 201 (3 Cir. 1961), rev'd on another issue sub nom. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 U. S. 355 (1962).

In *Knox* we said (p. 357): "If an obviously hazardous condition had been created by the longshoremen [in discharging a ship's cargo] and permitted to exist long enough for normal occasional observation of the course and progress of the work to disclose the existence of the danger to some officer of the ship, then the ship should have been found negligent."

[8] *Beard* v. *Ellerman Lines, Ltd.*, at page 206.

The District Court erred in failing to apply the foregoing principles and in making the "exercise of control" the exclusive criteria for testing the ship's negligence.

The District Court's fact-findings that the ship's third mate (1) had told the stevedore's foreman not to make big sling loads "because something might be could be happen" and (2) had failed to "interfere in any way with the conduct of the stevedoring"[9] required it to apply the principle that a ship is negligent when it knows of, and does not

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[9]Finding of Fact No. 8. The testimony of the ship's third mate relating to his cautioning against making "big slings" follows in part:

Direct Examination: Notes of Testimony, pages 77-78:

"Q. Prior to the time that they discharged the walking-boards which fell were you on the deck at No. 2 hold talking with a man from the stevedoring company?

"A. Yes, just before.

"Q. Do you know what his name was?

"A. I could not say, but he was the hatch foreman for the after part of hatch No. 2.

* * * *

"Q. Did you have a conversation with this man from the stevedoring company while you were there?

"A. Yes.

"Q. What were you discussing?

"A. First he asked me for slings.

"The Court. First he asked you?

"The Witness. For slings.

"The Court. For slings.

"The Witness. Yes. I bring him sling and put them on deck. I call his attention, I ask him, 'That is all right?' He look. Don't say no. Then I look in the hatch when they make the slings for walking boards. Then I said to him, 'Don't make them big slings because something might be could be happen and broken.' Then he answered to me, 'I am the foreman here and I know what I am doing.'"

Cross Examination: Notes of Testimony, page 81:

"Q. And did you have any other conversation until you got to discussing the size of the sling load or draft?

"A. Yes.

"Q. What did you say?

"A. I just said to him, *'Don't make too big sling.'*

"Q. *By sling you mean a big sling load, don't you?*

"A. Yes." (emphasis supplied)

forbid the use of a stevedore's method of discharging cargo which fails to conform to the standard of reasonable care and creates a hazardous condition.[10] The District Court's failure to apply the principle stated is reversible error. *Knox* v. *United States Lines Company*, 294 F. 2d 354, 357 (3 Cir. 1961); *Beard* v. *Ellerman Lines, Ltd.*, 289 F. 2d 201, 206 (3 Cir. 1961), rev'd on another issue, sub nom. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 U. S. 355 (1962).[11]

There remains for disposition the contention that the District Court failed to apply proper legal standards in premising its determination that the ship was not made unseaworthy by the stevedore's negligent conduct on the ground that the ship's equipment, viz, the manila ropes used in making up the slings, "was reasonably fit for its intended use."

Libellants contend that the sub-standard constructed draft—assembling two piles or tiers of plywood boards 2½ to 3 feet high *side by side*—when placed in the slings created defective equipment for use in discharging the cargo and that under the doctrine of *Rogers* v. *United States Lines*, 347 U. S. 984 (1954) and *Alaska Steamship Co., Inc.* v. *Petterson*, 347 U. S. 396 (1954) the vessel became unseaworthy. In the cases cited it was held that when a stevedore brings aboard ship defective equipment which causes an accident the ship is made unseaworthy.

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[10]It is apparent that the District Court treated the third mate's comments to the stevedore's foreman as merely relating to the issue of "exercise of control", and nothing more.

[11]In *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 (1963) where the critical issue was presented "as to the shipowner's liability for his torts which have impacts on shore", the Supreme Court approved the principle applied by the District Court that a vessel is liable in negligence in allowing cargo to be unloaded in defective bagging "when it knew or should have known that injury was likely to result."

Libellants urge that no valid distinction can be made between a stevedore's use of defective equipment which he brings aboard the ship and his fashioning of defective equipment to perform his work after he arrives aboard ship.

The ship and the stevedore dispute this contention and say in substance that the stevedore's negligent use of the ship's fit equipment does not make the ship unseaworthy. They cite in support of their view *Puddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752 (2 Cir. 1962), cert. den. 371 U. S. 840;[12] *Billeci* v. *United States*, 298 F. 2d 703 (9 Cir. 1962);[13] *Arena* v. *Luckenbach Steamship Company Inc.*, F. 2d 186 (1 Cir. 1960), cert. den. 364 U. S. 895.[14]

In *Crumady* v. *The Joachim Hendrik Fisser*, 249 F. 2d 818, 820-821 (1957), rev'd on other grounds, 358 U. S.

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[12]In *Puddu*, a stevedore was injured when a boom, part of the ship's equipment, buckled and broke. The District Court found that the ship was seaworthy on the ground that the boom itself was non-defective and the accident was occasioned solely by the negligent conduct of the stevedores in placing "unusual and dangerous stress on the boom." Implicit in the Second Circuit's affirmance of this finding on the ground that it was not "clearly erroneous" is the holding that a stevedore's negligence does not make a ship unseaworthy.

[13]In *Billeci* a winch fell out of a gear and became free-wheeling, due to the negligence of stevedores, causing a hatch section which had been raised but a few feet to simultaneously drop and swing to the port side where it skidded along the structure of the ship until it struck the libellant. Faced with this factual pattern the Ninth Circuit held at pages 705, 706: "The shipowner's warranty of seaworthiness does not extend to a negligent use by longshoremen of seaworthy appliances."

[14]In *Arena* a longshoreman was injured when a loading board tipped and spilled rolls of paper into the hold of the ship. It was contended on appeal from the District Court's direction of verdict in defendant's favor that the board was used by stevedores in an unsafe manner and that this alone rendered the ship unseaworthy. The First Circuit rejected this argument, holding among other things that "the board was not defective simply because the longshoremen who loaded it neglected to do so in a proper fashion."

423 (1959),[15] we held, on our fact-finding that the ship's equipment was not unseaworthy prior to its negligent use by the stevedore, that the stevedore's negligence did not make the ship unseaworthy.

Four years later, in *Knox* v. *United States Lines Company*, we remanded for trial "the issue of possible unseaworthiness caused by the [stevedore's] manner of breaking down the stowage." In doing so we referred to *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 212 (D. C. E. D. Va. 1960) as "a case not significantly different from the present case." 294 F. 2d 358, 359. In *Holley* it was held that a ship became unseaworthy when a longshoreman negligently created an overhang of solidified potash which later fell and killed him.

In *Knox* there had been a jury finding that the stowage was seaworthy *prior* to the commencement of the stevedore's breaking-down operation; here it is undisputed that the ship's equipment—the manila ropes—was fit for its intended use. Unless a valid distinction can be drawn between a stevedore's unsafe[16] breaking-down of a seaworthy stowage and its negligent (unsafe) use of a ship's equipment, a logical projection of our holding in *Knox*

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[15]The Supreme Court reversed on the ground that the District Court's fact-finding that the ship's equipment was unseaworthy prior to its use by the stevedore was not "clearly erroneous", and that the stevedore's negligence "did no more than to bring into play the unseaworthy condition of the vessel." 358 U. S. 427.

[16]In *Italia Societa per Azioni di Navagazione* v. *Oregon Stevedoring Company, Inc.*, decided March 9, 1964, it was stressed that in *Ryan* v. *Pan Atlantic Corp.*, 350 U. S. 124 (the landmark case in which it was established that a stevedore who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's improper stowage of cargo) that the basis of the injured longshoreman's recovery against the ship had been the failure of the stevedore "to perform safely, a basis for liability including negligent and non-negligent acts alike."

would seem to indicate our subscription to the view that a stevedore's negligent or unsafe use of a ship's seaworthy equipment makes the ship unseaworthy.

It compels notation that the Court of Appeals for the Fourth Circuit in *Scott* v. *Isbrandtsen Company, Inc.*, 327 F. 2d 113 (1964) has construed *Knox* as holding that a longshoreman's negligent method of discharging cargo makes the ship unseaworthy. ¶ In Scott it was said (pp. 125-126):

> "In this circuit it is no longer open to question that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and *in their method of operation* may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable for injury to a longshoreman resulting from such condition. This is true even though the condition be transitory and without knowledge of the ship's officers. Furthermore, contrary to defendant's argument, in determining unseaworthiness no significance attaches to the fact that no one complained of the alleged unsafe condition."

It is interesting to observe that in *Scott* the Court noted (p. 124):

> "The obvious trend of the Supreme Court decisions is toward providing ever increasing protection for crewmen, longshoremen and even others employed by independent contractors who may be called upon to work aboard vessels."

The Supreme Court has not yet spoken on the precise question as to whether a stevedore's negligence in the use of ship's seaworthy equipment makes the ship unseaworthy but doctrinal trends evidenced in its decisions since *Seas*

Shipping Co., Inc. v. *Sieracki,* 328 U. S. 85 (1946) indicate that it would answer the question in the affirmative.

In *Reed* v. *The Yaka,* 373 U. S. 410 (1963), the Supreme Court said (p. 413):

> "*In Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946), we held that a shipowner's warranty of seaworthiness extended to a longshoreman injured while loading the ship, even though the longshoreman was employed by an independent contractor. In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness. . . ."

In *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539 (1960), the Court after quoting extensively from *Sieracki* said (p. 549):

> "From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406; *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396; *Rogers* v. *United States Lines,* 347 U. S. 984; *Boudoin* v. *Lykes Bros. S.S. Co.,* 348 U. S. 336; *Crumady* v. *The J. H. Fisser,* 358 U. S. 423; *United Pilots Assn.* v. *Halecki,* 358 U. S. 613."

In *Morales* v. *City of Galveston,* 370 U. S. 165 (1962), the Supreme Court said (pp. 170-71):

> "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crow unfit. *The method* of loading [or unload-

> ing] her cargo, or the manner of its stowage, might be improper. (citing cases). *For any or all of these reasons, or others,* a vessel might not be reasonably fit for her intended service." (emphasis supplied)

In the instant case the District Court found negligent the stevedore's method of assembling two piles of plywood boards "side by side" to make a sling load. Whether the operation is regarded as "stowage" of the piles of boards as part of the discharge process, or the construction of a "draft", or as the mere use of the ship's equipment—the manila ropes—the fact remains that the stevedore "failed to perform safely, a basis for liability including negligent and non-negligent conduct alike", and that made the ship unseaworthy.[17]

For the reasons stated the Decree of the District Court dismissing the libel and the impleading petition will be vacated and the cause remanded with directions to proceed in accordance with this opinion.

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[17] Ibid.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 448—September Term, 1963.

(Argued April 29, 1964 Decided June 3, 1964.)

Docket No. 27945

NICOLA MASSA,

Plaintiff-Appellant,

—v.—

C. A. VENEZUELAN NAVIGACION,

Defendant and Third-Party Plaintiff-Appellant,

—v.—

JOHN W. McGRATH CORPORATION,

Third-Party Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
MOORE and SMITH, *Circuit Judges.*

Appeal from dis sal of longshoreman's complaint against shipowner and from dismissal of shipowner's third party complaint against stevedores in the United States District Court for the Eastern District of New York, Joseph C. Zavatt, *Chief Judge.*

Affirmed on longshoreman's appeal. Reversed on shipowner's appeal.

JACOB RASSNER, New York, N. Y., *for plaintiff-appellant.*

RENATO C. GIALLORENZI, New York, N. Y. (Hill, Betts, Yamaoka, Freehill & Longcope, New York, N. Y., on the brief), *for defendant and third-party plaintiff-appellant.*

JAMES M. LEONARD, New York, N. Y. (McHugh & Leonard, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Massa, the plaintiff longshoreman, was injured when a pallet being used to load the ship spilled some of its cargo on him. After a jury failed to reach a verdict, the United States District Court for the Eastern District of New York, Mortimer W. Byers, *J.*, dismissed the complaint against the shipowner, C. A. Venezuelan Navigacion, on the ground that the plaintiff had failed to prove a prima facie case. This court reversed and remanded for a new trial, for viewed in the light most favorable to the plaintiff, the evidence was sufficient to support a finding of unseaworthiness. 298 F. 2d 239 (1962). Upon remand, the case was tried before Chief Judge Joseph C. Zavatt, sitting without a jury, who found that the accident was not caused by a defective pallet but by the negligence of the plaintiff and his fellow longshoreman. Concluding that the ship was seaworthy and the shipowner free from negligence, the District Court dismissed the complaint and the third party complaint of the shipowner against the stevedore, John W. McGrath Corporation. 209 F. Supp. 404 (1962). The plaintiff now appeals from the dismissal of his complaint, and the shipowner appeals from the dismissal of his third party complaint to

recover counsel fees for defending the suit. We find no error in the ruling on the longshoreman's claim and affirm the dismissal of the complaint, but we reverse the dismissal of the third party complaint and direct the entry of a judgment awarding counsel fees and expenses to the third party plaintiff.

On February 25, 1955 the plaintiff was employed by the stevedore, then engaged in loading cargo onto the defendant's ship. Some of the cargo consisted of cases of lube oil cans, which were loaded evenly on rectangular wooden pallets. Each loaded pallet was brought to the side of the ship by a hi-lo and placed on a platform of two empty pallets, stacked one above the other to facilitate the task of the longshoremen who hooked up the loaded pallets to the ship's gear. The pallet was connected to the winch by a cable and a pallet bridle, which consisted of four wires joned at the top and spreading downward to connect with the ends of two metal bars. Each of the metal bars was equipped with two protruding metal tongs that fitted into apertures on the ends of the pallet.

The plaintiff was a member of a four man gang of longshoremen whose job was to insert the tongs into the pallet holes. The plaintiff was injured when some of the cargo spilled from a pallet that had been raised about eight feet by the ship's winch. The plaintiff claimed that the accident was caused by the rotting of the wood around the pallet hole, a defect that resulted in the tongs slipping out of the pallet holes. However, the trial court found that the accident was caused by the plaintiff and his fellow longshoreman inserting the tongs into the apertures in the empty pallet lying immediately beneath the loaded pallet into which they were supposed to insert the tongs. Thus, one of the metal bars was connected to the top pallet and the other connected to the empty pallet of the platform beneath.

I.

On this appeal the plaintiff claims that the findings of the trial court must be set aside as clearly erroneous and that the testimony of the defendant's witnesses must be disregarded because the parties at a previous trial had stipulated that there were three empty pallets stacked together as a platform. Since the trial court found that there were only two empty pallets in the supporting platform, the plaintiff claims that the court below must have been hoodwinked into believing that the plaintiff's witnesses and defendant's witnesses were all describing the same pallet. The basis of this contention is that "the only inference justified by the evidence was that the defective pallet was removed from the scene of the accident and that the witnesses who testified on behalf of the respondent did not see and knew nothing about the condition of the pallet involved in the accident."

This argument is nothing but vain imaginings. There is not a shred of evidence that anyone spirited away the pallet involved in the accident before the defendant's witnesses arrived at the scene, and there is substantial testimony to the contrary. The defendant's witnesses described the pallet partially loaded with cans of lube oil, and it is clear from the record that the pallet they were describing was the one alleged by the plaintiff to be defective. There was no stipulation at this trial that there were three pallets in the supporting platform. Because the parties unfortunately stipulated to the presence of three empty pallets in the platform at a previous trial during the plaintiff's cross-examination does not mean that they stipulated to such effect when they agreed that the plaintiff, for medical reasons, would be excused from testifying and that his prior testimony would be accepted into evidence.

There is no conflict between this court's earlier decision in this case and the result reached by the District Court. We remanded the case for a trial on its facts because the plaintiff had alleged sufficient facts, if proven, to entitle him to a verdict. But the plaintiff failed to prove these facts. The only witness to testify that the wood around the pallet holes had rotted was Marrocolla, and the trial court was not obligated to credit his testimony, particularly since it conflicted with his prior testimony and the testimony of the defense witnesses. Nor can we say that the plaintiff and his co-worker had rendered the ship unseaworthy by placing the tongs in the wrong holes. The doctrine of unseaworthiness requires no more than that a ship and appurtenances be reasonably fit for their intended use, and the trial court was justified in concluding that the pallets were reasonably fit. See *Hooper* v. *Terminal Steamship Co.*, 296 F. 2d 281 (2 Cir. 1961); *Pinto* v. *States Marine Corp. of Del.*, 296 F. 2d 1 (2 Cir. 1961), cert. denied 269 U. S. 843 (1962).

II.

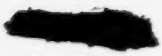
There is considerably more merit to the shipowner's appeal, and we think the District Court erred in dismissing the third party complaint. If the stevedore fails to use reasonable care in handling equipment or cargo, resulting in foreseeable or potential loss to the shipowner by rendering it likely to suit, the stevedore has breached its warranty of workmanlike service. *Paliaga* v. *Luckenbach Steamship Co.*, 301 F. 2d 403, 408 (2 Cir. 1962); *Damanti* v. *A/S Inger*, 314 F. 2d 395, 397 (2 Cir. 1963), cert. denied 375 U. S. 834 (1963). The stevedore is obligated to indemnify the shipowner for any loss incurred because of the stevedore's breach of its warranty of workmanlike service, and this obligation extends to the litigation expenses of de-

fending suits brought against the shipowner. *Nicroli* v. *Den Norske Afrika*, 2 Cir. 1964, Docket No. 27984; *Paliaga* v. *Luckenbach Steamship Co., supra*; *Guaraccino* v. *Luckenbach Steamship Co.* v. *Turner & Blanchard, Inc.*, 2 Cir. 1964, Docket No. 28379. There is no question that the stevedore breached its warranty to perform in a workmanlike manner; for the trial court found that the cause of the accident was the negligence of the stevedore's employees. This negligence rendered the shipowner liable to suit, and we see no good reason for forcing the shipowner to bear the expenses of successfully defending the suit when the stevedore would have to bear the shipowner's expenses of unsuccessfully defending the suit. Such a rule would place a premium on losing lawsuits. In *Paliaga* v. *Luckenbach Steamship Co., supra,* this court held it an abuse of discretion to dismiss a third party complaint for the shipowner's counsel fees where the stevedore had settled with the plaintiff longshoreman. As the Fifth Circuit correctly observed in *Strachan Shipping Co.* v. *Koninklyke Nederlandsche S. M., N. V.*, 324 F. 2d 746, 747 (5 Cir. 1963), cert. denied 32 L. W. 3327 (Mar. 24, 1964), the case for the shipowner in this situation is stronger than it was in *Paliaga*. The isolated cases which have refused to award counsel fees to the shipowner in this situation have been sharply criticized; one has even been repudiated by its author. *Bielawski* v. *American Export Lines*, 220 F. Supp. 265 (E. D. Va. 1963). The better reasoned cases support the award of counsel fees to the successful shipowner. *Strachan Shipping Co.* v. *Konindlyke Nederlandsche S. M., N. V., supra; Gonzales* v. *Penna. Railroad Co.*, 183 F. Supp. 779 (S. D. N. Y. 1960). The burden is best placed on the stevedore who can minimize expense and injury by insisting on greater safety precautions. *Guaraccino* v. *Luckenbach Steamship Co., supra.*

We hold that the District Court abused its discretion in failing to permit the recovery of counsel fees on the third party complaint.

Inasmuch as the parties have agreed that the $6,600 in counsel fees expended by the shipowner is fair and reasonable, we direct the entry of judgment against the stevedore for that amount plus disbursements of $999.81, making a total judgment of $7,599.81. Since part of the shipowner's efforts on appeal were devoted to resisting the claims of the plaintiff, we also tax the stevedore $300 for reasonable attorney's fees on that portion of the appeal to be paid to counsel for the shipowner. *Nicroli* v. *Den Norske Afrika, supra; Guaraccino* v. *Luckenbach Steamship Co., supra.*

The order dismissing the complaint is affirmed. The order dismissing the third party complaint is reversed and the entry of judgment for the third party plaintiff is ordered.



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AUG 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 275

SWEDISH AMERICAN LINES,

Petitioner,

—against—

JOSEPH J. FERRANTE, ANTONIO HRONCICH and VITO SALVEMINI,

Respondents,

—and against—

NACIREMA OPERATING CO., INC.,

Respondent-Impleaded,

BRIEF OF RESPONDENT-IMPLEADED, NACIREMA OPERATING CO. INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONER, SWEDISH AMERICAN LINES

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BRIEF OF RESPONDENT-IMPLEADED, NACIREMA OPERATING CO. INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONER, SWEDISH AMERICAN LINES

Opinions Below

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 331 F. 2d 571 and is printed in Petitioner's Appendix B. There was no District Court opinion.

Question Presented

Whether or not an accident sustained by a longshoreman caused solely by the stevedore's negligent

use of the ship's equipment, which is reasonably sound and fit for its intended purpose, renders the ship unseaworthy?

Statement of the Case

This is an action brought by libelants, three longshoremen against the Petitioner, Swedish American Lines, seeking a recovery for injuries sustained as a result of the alleged negligence of the shipowner and the unseaworthiness of its vessel. The longshoremen were employed by the Respondent-Impleaded, Nacirema Operating Co. Inc., and were injured during the course of unloading certain boards from one of the holds of the M/S "Maltesholm", owned by the Petitioner, Swedish American Lines. The latter impleaded the employer, Nacirema Operating Co. Inc. seeking indemnity from Nacirema in case the shipowner was held liable to the libelants.

At the time of the accident, October 28, 1960, the employees of the stevedore were engaged in discharging a load of plywood walking boards. These boards had been piled side by side into two stacks and rope slings, provided by the vessel, were placed around both piles of boards so that same could be lifted out of the hatch. While being lifted, the load came apart and some of the boards fell from the load, striking the libelants.

The libelants' expert witness stated that the standard and proper method of unloading the boards was to hoist one stack or pile at a time and that piling the boards in two rows, as was done in this case, would be an element that would cause them to fall; that the

use of rope or wire slings was standard practice and it would not matter whether a rope or wire sling was used. At the close of the libelants case as to liability, on motion of the vessel, Swedish American Lines, the Libel was dismissed, both as to the counts of unseaworthiness and negligence. On motion of Nacirema, the impleading petition for indemnity was also dismissed. On appeal, the Court of Appeals reversed and remanded the entire matter to the District Court for a new trial.

The Court of Appeals, noting that this court has not yet spoken of the precise question, held that a stevedore's negligence in the use of a ship's seaworthy equipment makes the ship unseaworthy (Appendix B, page 12b). The basic issue which underlies this problem is whether a shipowner is under an absolute obligation to furnish a longshoreman with an accident-free ship or whether the shipowner owes an absolute duty to a longshoreman to make stevedoring an accident-free occupation.

Reasons in Support of Granting the Writ

The Court of Appeals for the Third Circuit in declaring that a stevedore's sole negligence in the use of a ship's seaworthy equipment makes the ship unseaworthy and liable to an injured longshoreman, has rendered a decision which is in conflict with the decisions of other Courts of Appeals on the same matter, namely, the First, Second, Fourth and Ninth Circuits, which have uniformly refused to extend the shipowner's warranty of seaworthiness to a negligent use by longshoremen of seaworthy appliances. *Arena* v. *Luckenbach Steamship Co.*, 279 F.2d 196 (1 Cir.

1960), cert. denied, 364 U.S. 895 (1960); *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F.2d 752 (2 Cir. 1962), cert. denied, 371 U.S. 840 (1962); *Spinelli* v. *Isthmian Steamship Co.*, 326 F.2d 870 (2 Cir. 1964), cert. denied May 18, 1964; *Blankenship* v. *Ellerman's Wilson Line New York, Inc.*, 265 F.2d 455 (4 Cir. 1959); *Edward* v. *Steivns*, 207 F.2d 734 (4 Cir. 1953); *Billeci* v. *United States*, 298 F.2d 703 (9 Cir. 1962). The decision of the court below does not conform to fairly well settled law as expressed in the above cases and in *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F.2d 397, 400 (2 Cir. 1954), wherein the court said

> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's (the stevedore) supervision, he has no recourse against Cyprien (the shipowner)".

As stated in *Imperial Oil Ltd.* v. *Drlik*, 234 F.2d 4. 8 (6 Cir. 1956), cert. denied, 352 U.S. 941:

> "The obligation of the vessel owner to provide seaworthy appliances has not been extended to require the owner to keep those appliances from being used in a negligent manner."

Furthermore, the decision by the Court of Appeals in the instant case has decided this important question in a way which is in conflict with applicable decisions of this court, as found in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 924 (1960). For it was expressly stated in *Mitchell* (page 550 of 362 U.S.):

> "What has been said is not to suggest that the owner is obligated to furnish an acciden. free

> ship. The duty is absolute but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. *The standard is not perfection but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea,* but a vessel reasonably suitable for her intended service". (Italics added)

Thus, the effect of the decision below is to impose upon a shipowner an absolute obligation to furnish a longshoreman with an accident-free ship. Permitting claims to be enforced due to accidents caused solely by the misuse of sound equipment does not square with the Mitchell principle that not every "imaginable peril" is covered by the warranty of seaworthiness. If the mere happening of an accident or injury was sufficient to base a finding of unseaworthiness, the standard would be not reasonable fitness as declared in *Mitchell,* but that of perfection and the shipowner would be obligated to furnish an accident-free vessel. See also *Titus* v. *Santorini,* 258 F.2d 352 (9 Cir. 1958); *Ezekiel* v. *Volusia Steamship Co.,* 297 F.2d 215 (2 Cir. 1961).

In *Mosely* v. *Cia. Mar. Adra. S.A.,* 314 F.2d 223 (2 Cir. 1963), cert. denied, 375 U.S. 829 (1963) at page 228 the court stated:

> "* * * the most that Mosely proved was that the hook slipped while being used. But, as we have many times said, the mere fact that an accident occurs and a seaman is injured while using an appurtenance in performance of his duties, cannot, without more, establish that a vessel is unseaworthy".

Another reason why this court should grant the petition for review is that it is quite apparent that the decision of the Court of Appeals below would have several far reaching effects. One such effect would be that a longshoreman, injured for any reason whatsoever while working aboard ship, would be entitled to recover damages. And if the basis of the award of damages is solely an act of negligence on the part of the longshoreman, the shipowner will invariably recover full indemnity from the stevedore employer. Thus the result would completely render ineffective the exclusive liability provisions of the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424 (1927) as amended 33 U.S.C. Sec. 901-950 (1958). To impose this additional liability upon the employer in the situation where his sole negligence causes the injuries would radically distort the intent of Congress in enacting the Longshoremen's Act and would deprive the employer of the immunity which that statute granted to him in exchange for his absolute, though limited, liability to secure compensation to his employees. 44 Stat. 1426 (1927). 33 U.S.C. Sec. 905 (1958).

The issue concerning the creation of an unseaworthy condition or the negligent use of otherwise seaworthy equipment is an important question which has been and will continue to be a basis of many claims in maritime law and in actions over for indemnity. It is important that the legal concepts relating to this type of case be settled by this Court. Clarification of the rights of the parties to such actions is urgently needed and the rights, duties and obligations of stevedore-employers, in relation to the Longshoremen's Act, should be defined.

It is respectfully submitted that this Court should grant the Petition for Writ of Certiorari filed by the Petitioner, Swedish American Lines, so that the matter will be fully considered and the law clarified for the future guidance of all courts called upon to interpret and apply maritime law.

CONCLUSION

For the reasons set forth above, and in the Petition for Certiorari filed by Swedish American Lines, it is respectfully urged that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1964

No. 275

SWEDISH AMERICAN LINES,
Petitioner,

against

JOSEPH FERRANTE, ANTONIO HRONCICH and VITO SALVEMINI,
Respondents,

against

NACIREMA OPERATING CO., INC.,
Respondent-Impleaded.

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Opinions Below

The District Court's findings of fact and conclusions of law (there was no opinion) were not officially reported but were quoted in the opinion of the United States Court of Appeals, set forth in Petitioner's Appendix B, pages 1b to 14b. The opinion is reported at 331 F. 2d 571.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 16, 1964. The jurisdiction of this Court is predicated upon 28 U. S. C. § 1254(1).

Questions Presented

1. Whether there was an issue of fact of shipowner's negligence when the ship's officers knew, or should have known, that the stevedore method of discharging its cargo did not conform to the standard of reasonable care, thereby creating a hazardous condition, and did not forbid use of the method.

2. Whether there was an issue of fact of shipowner's failure to provide a seaworthy vessel, arising out of stevedore's use of an improper method of unloading cargo thereby creating a hazardous condition.

Statutes and Regulations Involved

No statutes or regulations have heretofore been introduced into this matter. Petitioner asserts that the Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1504, are now herein involved.

Said regulations are set forth in Petitioner's Appendix A, pages 1a-6a.

Statement of the Case

The findings of fact by the District Court are as follows:

"Findings of Fact

"1. Libelants Joseph J. Ferrante, Antonio Hroncich and Vito Salvemini, were on October 28, 1960, and now are residents of the State of New Jersey, and were injured while working as longshoremen employed by Nacirema Operating Co., Inc. in the #2 hold of the M/S Maltesholm on October 28, 1960.

"2. Claimant-respondent, Swedish American Lines was and now is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Sweden and was, on October 28, 1960, and still is, the owner of the M/S Maltesholm.

"3. Respondent-Impleaded, Nacirema Operating Co., Inc., was, on October 28, 1960, and now is, a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States and was on October 28, 1960, and still is, doing business in the State of New Jersey as a stevedore.

"4. The M/S Maltesholm was on October 28, 1960, and now is, a merchant vessel of Swedish registry, her home port being Gothenburg, Sweden. The ship had six hatches, #2, the site of the accident, being in the forward part of the ship.

"5. Libelant Ferrante asked the stevedore hatch boss for slings to be used in unloading some plywood boards. In turn the hatch boss asked the third mate of the ship for 'slings.'

"6. The third mate of the M/S Maltesholm procured and gave to the stevedore hatch boss two manila rope slings which the hatch boss then sent down to the employees of Nacirema, who proceeded to make up a sling load of plywood boards by assembling two piles of the boards side by side, these piles resting on 4 x 4 timbers so that each sling could be passed beneath the boards. Each sling was passed around the piles, one at each end, looped through itself and attached to a single hook. The hook was attached to wire rope runners which would lift the sling load from the hold.

"7. The making up of this sling load was done entirely by and under the direction of employees of Respondent-Impleaded.

"8. The only suggestion made by the third mate to the hatch boss was not to make big sling loads 'because something might be could happen and broken,' to which the hatch boss replied 'I am the foreman and I know what I am doing.' No attempt was made by the third mate to direct the method of unloading nor did he interfere in any way with the conduct of the stevedoring.

"9. When the sling load of boards was lifted out of the hatch, the load came apart and some of the boards fell, striking Libelants and injuring them.

"10. Libelants' expert witness (with extensive experience as a longshoreman, as a supervisor of loading and unloading ships and as a ship foreman) testified that it was not standard procedure to make two piles of plywood boards, placed side by side to be lifted by slings, single piles only being used to make a sling load. He further testified that if this standard practice were not followed, it would be an element that would cause the load to fall. He also testified that the use of either rope or wire is standard practice for lifting plywood, and that there was a preference for the use of rope on plywood.

"11. The accident was caused by the manner in which the sling load was made up by employees of Respondent-Impleaded with two piles, side by side.

"12. The duties of the third mate did not include supervision and control of the manner in which the longshoremen were doing their work. Rather, his duties consisted in pointing out the cargo to be discharged at Jersey City and also to observe the longshoremen so as to prevent damage to or theft of cargo, damage to the ship or smoking by the longshoremen.

"13. At the close of Libelant's case as to liability, Libelants have reserved their rights to introduce further medical testimony. Claimant-Respondent reserving its rights to proceed further if its motion be denied, moved to dismiss the libel and Respondent-Impleaded, with a similar reservation of rights if its motion be denied, moved to dismiss the petition."

Said facts were summarized by the Court of Appeals in its decision as follows:

"At the time of the accident the stevedore's longshoremen were engaged in discharging 9' x 5' 3/4" plywood boards from No. 2 hold of the M/S Maltesholm; the longshoremen used manila ropes sup-

> plied by the ship to form a sling in which two piles or stacks of board were placed; while a sling load was being lifted out of the hatch it came apart and some of the boards fell injuring the libellants; the placing of two piles of boards in a sling was not standard procedure; the loading of the slings 'was done entirely by and under the direction' of the stevedore; 'the accident was caused by the manner in which the sling load was made up'; the third mate of the ship, one Szewczyk, told the stevedore's foremen 'not to make big sling loads "because something might be could be happen and broken" ', but 'no attempt was made by the third mate to direct the method of unloading nor did he interfere in any way with the conduct of the stevedoring.' "

The Court of Appeals took issue with the conclusions of the District Court, refusing to negate shipowner's liability for negligence because of absence of exercise of control over the stevedoring operation, holding that such exercise of control was not the exclusive criteria for testing the owner's negligence in view of evidence presented that the officers knew or should have known that the stevedore's method of discharging its cargo did not conform to the standard of reasonable care, thereby creating a hazardous condition, and failing to forbid the use of that method of discharge. Further, the Court held that an issue of fact was presented as to whether the vessel was unseaworthy by reason of stevedore's negligent conduct creating a hazardous condition in employing an improper method of discharging cargo, a failure to perform the operation safely.

ARGUMENT

I

The issue of negligence.

The Court below remanded this matter for a new trial on the ground that there was sufficient evidence presented as to whether Petitioner's officers knew or should have known that an unsafe method of discharge of the cargo would be undertaken. In view of the acknowledged duty upon the shipowner to provide longshoremen with a safe place to work, *Halecki* v. *United,* 251 F. 2d 708 (2C), affirmed on point and reversed on other grounds, 358 U. S. 613; *Beard* v. *Ellerman,* 289 F. 2d 201 (3C), affirmed on point and reversed on other grounds, sub. nom., *Atlantic* v. *Ellerman,* 369 U. S. 355, there was nothing more than an affirmation of the long-settled principle of law that shipowner's knowledge of a dangerous condition, coupled with its failure to rectify, would give rise to liability irrespective of whether it had control of the area, *Hawn* v. *Pope & Talbot,* 198 F. 2d 800 (3C), affirmed 346 U. S. 406; *Skovgaard* v. *Tungus,* 252 F. 2d 14 (3C), affirmed 358 U. S. 588; *Halecki* v. *United,* 251 F. 2d 708 (2C), reversed on other grounds 358 U. S. 613; *Gutierrez* v. *Waterman,* 373 U. S. 206; *Brabazon* v. *Belships,* 202 F. 2d 904 (3C); *Holley* v. *Manfred,* 269 F. 2d 317 (4C); *Knox* v. *United,* 294 F. 2d 354 (3C), and for the same principle of law under the Federal Employers' Liability Act, 45 U. S. C. § 51, *et seq.*; *Shenker* v. *Baltimore,* 374 U. S. 1.

As such, the conclusion by the Court below that the District Court had incorrectly made "the 'exercise of control' the exclusive criteria for testing the ship's negligence" was eminently sound law, consistent with the decisions of this Court and of various Courts of Appeals.

There is certainly no conflict between the circuits, nor is the issue, so often answered, of nationwide importance at this time.

II

The issue of unseaworthiness.

In remanding the matter on the question of shipowner's failure to provide a seaworthy vessel, the Court below affirmed the oft-stated law that a question of fact existed of shipowner's liability when an unseaworthy condition was caused by the failure of the stevedore to properly discharge cargo due to employment of an improper method or manner of operation.

In so doing the Court affirmed the District Court's finding of stevedore's negligence in the "method of assembling two piles of plywood boards 'side by side' to make a sling load", holding that the failure of the stevedore to perform safely was a basis for liability for shipowner's failure to provide a seaworthy vessel.

The opinion was consistent with decisions of this Court in finding that an improper method of loading or unloading cargo or improper use of incidental equipment might give rise to unseaworthiness, *Morales* v. *City*, 370 U. S. 165; *Seas* v. *Sieracki*, 328 U. S. 85, *Alaska* v. *Petterson*, 347 U. S. 396; *Rogers* v. *United*, 347 U. S. 984; *Ryan* v. *Pan-Atlantic*, 350 U. S. 124; *Weyerhaeuser* v. *Nacirema*, 355 U. S. 563; *Crumady* v. *Fisser*, 358 U. S. 423; *Atlantic* v. *Ellerman*, 369 U. S. 355, that the stevedore's failure to perform safely was a basis of shipowner's liability, *Italia* v. *Oregon*, 376 U. S. 315.

Petitioner's concept of the question posed to the Court below and to this Court appears to be unduly restrictive. The thrust of the opinion by the Court of Appeals centered on the issue of stevedore improper activity creating a hazardous (unseaworthy) condition. As such it was the creation of the unseaworthy condition that was stressed, not whether ship's equipment was safe for the purpose intended. In so doing, the Court again affirmed this Court's

decision in *Alaska* v. *Petterson*, 347 U. S. 396, affirming 205 F. 2d 478 (9C), in holding that it was "only necessary to show that the *condition* upon which the absolute liability is determined—unseaworthiness—exists" (p. 479).

Consistent with the decisions in *Alaska* v. *Petterson*, *supra*, and *Crumady* v. *Fisser*, 358 U. S. 423, whether stevedore use of an improper method of discharging cargo created an unseaworthy condition was held to be a question of fact, *Grillea* v. *United States*, 232 F. 2d 919 (2C); *Grzybowski* v. *Arrow*, 283 F. 2d 481 (4C); *Knox* v. *United*, 294 F. 2d 354 (3C); *Puddu* v. *Royal*, 303 F. 2d 752 (2C); *Ballwanz* v. *Isthmian*, 319 F. 2d 457 (4C); *Knox* v. *United*, 320 F. 2d 247 (3C); *Provenza* v. *American*, 324 F. 2d 660 (4C);[1] *Scott* v. *Isbrandtsen*, 327 F. 2d 113 (4C).

The District Court's determination erroneously excluded consideration of the issue as to whether conduct by the stevedore could render the vessel unfit for the purpose intended, improperly restricting the doctrine of seaworthiness to examination of conditions created by ship's equipment. As such, the decision by the Court of Appeals was correct in remanding the case for further determination on a proper basis—whether the vessel was unseaworthy in view of the evidence of stevedore's negligence in improperly discharging the boards.

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[1] *In Provenza* v. *American*, 324 F. 2d 660 (4C), the Department of Labor's Safety and Health Regulations for Longshoring, 29 C. F. R. Part 1504, defining reasonably safe conditions, were held binding upon the shipowner as well as the stevedore-employer, the Court holding that "their violation would render the ship unseaworthy" (p. 665), that "The regulation casts upon the shipowner no new duty, nor does it relieve him of any pre-existing duty * * *. It prescribes a standard of safety, not a new duty" (p. 666).

Petition for writ of certiorari was denied, 376 U. S. 952.

There was and is no inconsistency between circuits, nor is the question presented of any uncommon importance, involving only the failure of a trial Court to follow settled concepts of law as laid down by this Honorable Court and the several Courts of Appeals in the cases discussed above.

CONCLUSION

The writ of certiorari should be denied in accordance with the facts and law above set forth.

Dated: New York, New York,
August 25th, 1964.

Respectfully submitted,

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—and against—

NACIREMA OPERATING CO., INC.,
Respondent-Impleaded.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

STATEMENT

Respondents have failed to meet petitioner's argument that the Third Circuit's holding is directly contrary to the criteria of liability of a shipowner for breach of the warranty of seaworthiness adopted by the Courts of Appeal for the First, Second, Fourth and Ninth Circuits. These Circuits have held that a shipowner warrants the ship as reasonably fit, not that the employees of others are always careful.

Respondents have failed to meet petitioner's argument that a shipowner cannot be held liable for negligence when, as found by the judge who heard and appraised the witnesses, a sling load is improperly made up, without the

ship's knowledge, by longshoremen in the employ of an independent contracting stevedore.

Respondents' interpretation of the authorities emphasizes the present conflict and the necessity for clarification.

Respondents have incorrectly stated that the Department of Labor Safety and Health Regulations for Longshoring, 29 C.F.R. 9, have not been heretofore introduced herein. This is probably because counsel for respondents here was not present at the trial when these regulations were thoroughly briefed and argued.

Finally, respondents have not appreciated that the issues of fact were found in favor of petitioner below. The dismissal resulted from respondents' failure to prove their case even after calling one of petitioner's witnesses.

ARGUMENT

Respondents cite a number of decisions of this Court as standing for the principle that "an improper method of loading or unloading cargo or improper use of incidental equipment might give rise to unseaworthiness" and conclude that there is no novel rule of law set out in the opinion of the Court below. In reaching this conclusion respondents have obviously ignored the clear language of the Court below to the effect that:

> "The Supreme Court has not yet spoken on the precise question as to *whether a stevedore's negligence in the use of ship's seaworthy equipment makes the ship unseaworthy* * * *" (Emphasis added) 331 F. 2d 571, 578 (set out at Petition p. 12b).

In claiming that the only question presented on the issue of unseaworthiness is a question of fact, respondents have not only overlooked that part of the opinion of the Court of Appeals quoted above but they have chosen to ignore the lead-

ing precedents in the First, Second, Fourth and Ninth Circuits which were set out in the original petition and which hold directly contrary to the Third Circuit.

This Court is no doubt aware that the question presented herein is also currently pending in a petition for this Court to take certiorari in another Third Circuit case, *Thompson* v. *Calmar Steamship Corp.*, 331 F. 2d 657, which was docketed under No. 398 on August 18, 1964. Only recently this Court seemingly approved the rule of the Second Circuit when it denied certiorari in *Spinelli* v. *Isthmian Steamship Co.*, No. 991, October 1963 term, 326 F. 2d 870, cert. denied 377 U. S. 935, rehearing denied 377 U. S. 1010. A motion for leave to file a second petition for rehearing is currently pending in the *Spinelli* case. It is interesting to note that while the longshoremen—respondents herein deny that there is any inconsistency between the Circuits, the longshoreman—petitioner in *Spinelli* based his application for a rehearing on the Third Circuit's then recent decisions in *Ferrante*, and *Thompson*, contending that with *Ferrante* and *Thompson* on the books there was clearly a conflict between the Circuits.

Even according to respondents' view of the authorities there is a present conflict among the Circuits. The general authorities cited on page 7 of the respondents' brief have not resulted in uniformity among the Circuits. *Grillea* v. *United States*, 232 F. 2d 919 (CA 2, 1956), cited on page 8 of respondent's brief, was clearly distinguished by *Billeci* v. *United States*, 298 F. 2d 703 (CA 9, 1962) and any applicability it may have had to the instant case has now been overruled by *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (CA 2, 1962), *Spinelli* v. *Isthmian Steamship Co.*, 326 F. 2d 870 (CA 2, 1964) and *Massa* v. *C. A. Venezuelan Navigacion*, 332 F. 2d 779 (CA 2, 1964).

The Fourth Circuit decisions of *Edwards* v. *Steinns*, 207 F. 2d 734 (1953) and *Blankenship* v. *Ellerman's Wilson Line New York Inc.*, 265 F. 2d 455 (1959) are in conflict with respondents' interpretation of *Provenza* v. *American Export Lines*, 324 F. 2d 660 (1963).

The opinion of the Third Circuit in the instant case would make the shipowner liable for breach of the warranty of seaworthiness, a concept of liability which operates irrespective of notice, for the operational negligence of an employee of an independent contracting stevedore, despite the fact that the ship and all the equipment in use at the time of the accident was fit for its intended use. It cannot be denied that this is a question of far reaching significance in the maritime industry. Without undertaking any redefinition or providing any rational guide lines, the Court below has attempted to change the shipowner's warranty of seaworthiness to a shipowner's guarantee of careful performance by an independent contractor. It has cast aside this Court's explicit and oft repeated limitations on the obligations owed by a shipowner under the warranty:

> "The duty is absolute *but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.*" (Emphasis added) *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550 (1960)

It was the position of petitioner in the Court of Appeals, and it is petitioner's position before this Court, (see Petition, pages 8-10) that there is no evidence in the record to support the contention of respondents that the mate knew of the manner in which the sling loads were being constructed by the longshoremen. The District Judge found that at the time the mate placed the slings on the deck and before the slings were placed around the draft, the mate merely said to the hatch boss "don't make them big

slings because something might be could happen and broken." The mere presence of a mate on deck does not impose liability for negligence on a shipowner when the details of the stevedoring operation are turned over to a qualified independent contracting stevedore. *Puddu* v. *Royal Netherlands S.S. Co.*, 303 Fed. 2d 752 (2 CA, 1962), cert. denied 371 U. S. 840; *Gallagher* v. *United States Lines Co.*, 206 Fed. 2d 177 (2 CA, 1953) cert. denied 346 U. S. 897. Absent notice of an unsafe method of discharge, the mate had no duty to inquire into the method of making up an individual sling load. This was the responsibility of the stevedore not the shipowner, 29 C.F.R. 9.2(a), 9.2(b), 9.81(c), 9.82(a).

The Department of Labor Regulations (29 C.F.R. 9) were thoroughly briefed by petitioner at the trial (pp. 8-10, Swedish American Line Trial Brief) and were cited by the trial judge in his conclusions of law. The statement that these Regulations had not heretofore been involved probably resulted from the fact that respondents' counsel here was not at the trial.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated, New York, N. Y., September 4, 1964.

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